Suprem Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GERALD E. ALEXANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

Petitioner submits that his application for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit presents the following question for review:

Did the 1960 Amendments to the suits in Admiralty Act deprive seamen of a pre-existing remedy against the United States for personal injuries caused by agents of the United States Government?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

DECISIONS BELOW 1

JURISDICTION 1

46 U.S.C. §741. **Exemption of United States vessels and cargoes from arrest or seizure** ... 2

46 U.S.C. §742. **Libel *in personam*** 2

46 U.S.C. §745. **Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims** 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 4

ARGUMENT 6

A. THE DECISION BELOW CONFLICTS WITH THE SECOND, THIRD AND FOURTH CIRCUITS AND CLEARLY EXPRESSED LEGISLATIVE INTENT AS TO WHETHER THE AGENCY ARRANGEMENT MAKES THE UNITED STATES A PROPER AND EXCLUSIVE DEFENDANT 6

B. THE DECISION BELOW CONFLICTS WITH *AMELL* AS TO WHETHER THE PRIVATE PARTY LANGUAGE OF SECTION 742 CAN AFFECT SEAMAN'S RIGHTS AND *IN REM* SUITS AGAINST SHIPS OWNED BY GOVERNMENT AGENTS 7

C. THIS DECISION BELOW CONFLICTS WITH *COSMOPOLITAN* AS TO THE SUABILITY OF THE OPERATING AGENT SHIPOWNER 10

TABLE OF CONTENTS – Continued

Page

D. THE DECISION CONFLICTS WITH *CALMAR* BY EXEMPTING TIME CHARTERS FROM EXCLUSIVITY 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. United States, 63 F.3d 820 (9th Cir. 1995) 1

Amell v. United States, 384 U.S. 158 (1966) 5, 7, 9

Blamberg Brothers v. United States, 43 S.Ct. 179 (1923) 11

Bradey v. United States, 151 F.2d 742 (2d Cir. 1945) ..7, 15

Burkholder v. United States, 60 F.Supp. 700 (E.D.Pa 1945) 13

Caldarola v. Eckert, 332 U.S. 155 (1947) 11

Calmar S.S. Co. v. United States, 96 S.Ct. 1319 (1976) ..5, 13

Cosmopolitan Shipping Co. v. McAllister, 335 U.S. 870 (1949) 5, 10, 11, 12

Dibiase v. United States, 711 F.Supp. 648 (D.Maine 1989) 13

Eastern Transport Co. v. United States, 47 S.Ct. 289 (1926) 11

Epstein v. United States, 86 F.Supp. 740 (S.D.N.Y. 1949) 13

Gulf Oil Corporation v. United States, 121 F.Supp. 937 (S.D.N.Y. 1954) 13

Kunglig Jarvagsstyrelsen v. United States, 19 F.2d 761 (2d Cir. 1927) 4

Lustgarten v. U.S. Shipping Emergency Fleet Corp., 280 U.S. 320 (1930) 11

TABLE OF AUTHORITIES – Continued

Page(s)

Matson Navigation v. United States, 284 U.S. 352 (1932) 13

Petition of the United States, 367 F.2d 503 (3rd Cir. 1966) 7

Smith v. United States, 346 F.2d 449 (4th Cir. 1965) 6, 12, 15

Stubblefield v. Vickers Towing Company, 674 F.Supp. 566 (N.D.Ms. 1987) 13

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) 10

Szka v. United States Secretary of Defense, 525 F.2d 62 (2d Cir. 1975) 6

Trautman v. Buck Steiber, 693 F.2d 490 (5th Cir. 1982) 14

Williams v. Central Gulf Lines, 874 F.2d 1058 (5th Cir. 1989), *cert. denied*, 493 U.S. 1045 .....4, 6, 10, 15

RULES, CODES AND STATUTES

S. Rep. No. 1782, 81st Cong., 2d Sess. 1950, U.S. Code Cong. Sess. 4210 6

S. Rep. No. 1894, 86th Cong., 2d Sess. 10-111 (1960), republished in 1960 8

Jones Act, 46 U.S.C. §688 .....1, 14

Public Vessels Act, 46 U.S.C. §782 1

1950 U.S. Code, Cong. Serv., at page 4209 11

28 U.S.C. §1254 1

28 U.S.C. §2679(b)(1) 7

28 U.S.C. §2680 7

TABLE OF AUTHORITIES – Continued

Page(s)

46 U.S.C. §741 ..... 1, 10, 11, 13

46 U.S.C. §742 ..... 7, 8, 15

46 U.S.C. §745 2

Suits in Admiralty Act S.Rep.No. 1894, at p. 2 9

2 Schoenbaum, *Admirality and Maritime Law,* Section 20-1 (2d Ed. 1994) 6

DECISIONS BELOW

1. The United States of America filed a Motion for Summary Judgment asserting that Alexander's exclusive remedy was against Vessel Charterers, Inc. On November 10, 1993 summary judgment was granted by the United States District Court for the Northern District of California. (Appendix pages 9-19.)

2. On August 7, 1995, the United States Court of Appeals, Ninth Circuit, affirmed the granting of summary judgment, *Alexander v. United States,* 63 F.3d 820 (9th Cir. 1995). (Appendix pages 1-8.)

3. Alexander's request for Rehearing was denied by the Court of Appeals for the Ninth Circuit on September 27, 1995. (Appendix page 20.)

JURISDICTION

Jurisdiction of the district court was predicated upon the Jones Act, 46 U.S.C. §688 and the General Maritime Law. Alexander argued that jurisdiction was either pursuant to the Suits in Admiralty Act, 46 U.S.C. §741, et seq. or the Public Vessels Act, 46 U.S.C. §782. This Court has jurisdiction pursuant to 28 U.S.C. §1254 and is requested to review the decision of the Ninth Circuit Court of Appeals in affirming the district court's entry of summary judgment.

STATUTES INVOLVED

Alexander's Petition raises far-reaching issues concerning the interpretation and application of the Suits in

Admiralty Act, especially the intent of Congress in amending the Act in 1960.

> 46 U.S.C. §741. **Exemption of United States vessels and cargoes from arrest or seizure.**
>
> "No vessel owned by the United States . . . or operated by or for the United States . . . and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions. . . . "
>
> 46 U.S.C. §742. **Libel in personam.**
>
> "In cases where if such vessel were privately owned or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in Section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . . In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party."
>
> 46 U.S.C. §745. **Causes of action for which suits may be brought; limitations; exceptions;**

actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: Provided, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim.

STATEMENT OF THE CASE

Gerald Alexander was the Chief Mate aboard the S/S SANTA ADELA. On September 7, 1989 he sustained a fractured skull in Korea when another crew member negligently caused a lifeboat winch crank to strike his head.

The S/S SANTA ADELA was operated exclusively for the Military Sealift Command, an agency of the armed forces of the United States and was used for transporting ammunition to Korea. Although its owner, VCI, provided the crew, the ultimate control of the S/S SANTA ADELA, resided with MSC in every respect regarding decisions involving navigation, care, custody and sailing routes.

There can be no legitimate factual dispute that the S/S SANTA ADELA was "operated for" the MSC by VCI as its agent. As is usual in Government charters for national defense purposes, its agreement with VCI specified that the SANTA ADELA is an "asset" and a "representative of the United States Government."

Subsequent to Alexander's injury, VCI went bankrupt.

Under the agency agreement, VCI added the United States as an additional assured to its liability policy. The insurance, however, was for indemnity only, and, therefore, if the United States is not liable to Mr. Alexander, he will not get the benefit of the policy.

REASONS FOR GRANTING WRIT

For at least the last 50 years, the backbone of the supply lines to our country's national defense has been merchant ships chartered by the United States Government and manned by merchant seamen.

Merchant seamen are wards of the admiralty court and as such they are afforded the right to seize a vessel which causes them injury in order to foreclose a maritime lien and require the posting of a bond which protects them against the bankruptcy of the shipowner.

One of the primary purposes of the Suits in Admiralty Act was to prevent the exercise of maritime liens upon ships chartered for military missions by making the United States the exclusive defendant in injury suits by members of the crew of such ships. *Kunglig Jarvagsstyrelsen v. United States,* 19 F.2d 761 (2d Cir. 1927), 46 U.S.C. §741.

The decision below follows *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert. denied,* 493 U.S. 1045 and would allow the exercise of such liens and

seizure of such ships coincident to suits against the shipowner, upon a showing that the ship was time chartered, rather than bareboat chartered, a distinction made by arcane and complicated rules often dependent on the facts of the particular operation in progress at the time of the injury.

The Fifth and Ninth Circuits are thereby in conflict with the teachings of the Second, Third and Fourth Circuits and of this Court in *Amell v. United States,* 384 U.S. 158, 164-165, text accompanying fn. 10 (1966), *Cosmopolitan Shipping Co. v. McAllister,* 335 U.S. 870 (1949) and *Calmar S.S. Co. v. United States,* 96 S.Ct. 1319 (1976).

As of the time this petition is being filed, there are time-chartered ships supplying the United States peacekeeping efforts in the Balkans. Should a member of the crew of one of these ships be injured, he or she could interrupt the ship's mission by filing an *in rem* lawsuit. If such a suit were filed, there is little doubt that the United States would challenge it and urge that the decision below be overruled as contrary to the Suits in Admiralty Act and that such a challenge would succeed. However, it would be too late for Mr. Alexander to benefit from it. This is why this Court is the only forum in which his rights can now be enforced.

ARGUMENT

A. THE DECISION BELOW CONFLICTS WITH THE SECOND, THIRD AND FOURTH CIRCUITS AND CLEARLY EXPRESSED LEGISLATIVE INTENT AS TO WHETHER THE AGENCY ARRANGEMENT MAKES THE UNITED STATES A PROPER AND EXCLUSIVE DEFENDANT

As is discussed in the most up-to-date text on the subject, 2 *Schoenbaum, Admiralty and Maritime Law,* Section 20-1 pp. 448-449 and fn. 15 (2d Ed. 1994), a later version of the *Schoenbaum* first edition cited in the decision below on 63 F.3d at 822-823, the operative inquiry as to the applicability of the "exclusivity provision" of the Suits in Admiralty Act is not the nature of the charter but whether the shipowner is an agent of the Government, citing *Szka v. United States Secretary of Defense,* 525 F.2d 62 (2d. Cir. 1975). Both *Williams,* which *Schoenbaum* cites with disapproval, and the decision below unequivocally refuse to make such an inquiry.

Under the teaching of *Smith v. United States,* 346 F.2d 449 (4th Cir. 1965) an operator such as VCI of a vessel chartered to the United States is a maritime agent of the United States for purposes of the Suits in Admiralty Act, causing the United States to be exclusively liable for injuries to members of the crews of such vessels.

The Suits in Admiralty Act was amended in 1950 to halt judicially created "legal confusion and to provide an exclusivity of remedy," bringing an end to uncertainty in the choice of defendants. S. Rep. No. 1782, 81st Cong. 2d Sess. 1950, U.S. Code Cong. Sess. 4210.

As stated by *Bradey v. United States*, 151 F.2d 742 (2d Cir. 1945) the primary purpose of the Suits in Admiralty Act has long been to substitute an *in personam* remedy against the United States for an *in rem* remedy against the private shipowner who charters his vessels for national defense purposes.

When, as here, the charter makes the vessel an asset and a representative of the United States Government and thereby causes its owner to become a Government agent, this is designed to make the United States exclusively liable for any vessel caused injuries. *Petition for United States*, 367 F.2d 505 (3rd Cir. 1966)

In 28 U.S.C. Section 2679(b)(1), Congress has expressed its unequivocal intent that a suit against the United States Government be the exclusive remedy for any injury caused by an agent or employee of the United States acting in the scope of his employment. However, 28 U.S.C. Section 2680 exempts any claim for which a remedy is provided by the Suits in Admiralty Act. If for no other reason, where the agency agreement (clause H 30.1) states that the "ship is considered a representative of the U.S. Government" it comes within the ambit of Section 2679(b).

B. THE DECISION BELOW CONFLICTS WITH *AMELL* AS TO WHETHER THE PRIVATE PARTY LANGUAGE OF SECTION 742 CAN AFFECT SEAMAN'S RIGHTS AND *IN REM* IN SUITS AGAINST SHIPS OWNED BY GOVERNMENT AGENTS

The bedrock foundation of the decision below is its finding (63 F.3d at 822) that "Alexander can maintain his

personal injury action against the United States if his action could be maintained *against a private party under traditional admiralty law"* (emphasis added). For the reasons about to be discussed, this finding is in direct contradiction to *Amell, supra.*

In Section 742, the phrase "if a private person- * * * were involved" was added in 1960 to expand the jurisdiction of the District Courts in admiralty suits against the Government, by eliminating uncertainty about whether some cases otherwise maritime in character had to be brought in the Court of Claims. Congress never intended when it amended Section 742 to cut down on the Government's exposure to liability under Section 741, which had as its original purpose, the purely public objective of avoiding an interruption of performance by ships in government service.

Thus, the addition in Section 742 of the phrase "if a private person * * * were involved" was added by, Section 3, of Public Law 86-770. The amendment was first proposed after the House of Representatives had passed a bill authorizing transfer of certain cases between the Court of Claims and the district Courts. In a letter to the Senate Judiciary Committee, the Secretary of Commerce, having conferred with the Department of Justice, suggested that Section 2 of the Suits in Admiralty Act also be amended to resolve "questions of jurisdiction and uncertainties as to proper forum". S. Rep. No. 1894, 86th Cong., 2d Sess. 10-111 (1960), republished in 1960 U.S. Code Cong & Admin. News 3591. The Judiciary Committee acted on the suggestion and inserted into the bill, a new section containing the amendment in question.

As explained in the committee report:

> "The purpose of the amendments is to make as certain as possible that suits brought against the United States for damages caused by vessels and employees of the United States through breach of contract or tort can be originally filed in the correct court so as to proceed to trial promptly on their merits.
>
> * * *
>
> Its [the amendment] purpose is to prevent the repetition of misfiling in the future. It restates in brief and simple language the now existing exclusive jurisdiction conferred on the District Courts, both on their admiralty and law sides, over cases against the United States which could be sued on in admiralty if private vessels, persons, or property were involved.
>
> * * *
>
> The bill . . . clarifies confusing language now existing in Section 2 of the Suits in Admiralty Act. S. Rep. No. 1894 *Supra,* at p. 2.

Subsequently, the bill was passed by both Houses of Congress without debate. 106 Cong. Rec. 16927, 17595, 18409 (1960). Nowhere was there the slightest indication that the legislature intended or even considered that the amendment created a limitation on the previous waiver of sovereign immunity.

In *Amell v. United States,* 384 U.S. 158, 164-165 text accompanying fn. 10 (1966), this Court reviewed the legislative history of the 1960 amendment and refused to construe it as cutting down on the rights of seamen. Neither of the two cases cited by the decision below (63

F.3d at 823), *Sutton v. Earles*, 26 F.3d 903, 911-912 (9th Cir. 1994) and *Williams, supra*, made such inroads. *Sutton* expanded the Government's duty to warn while *Williams* relieved a seaman from the two-year statute of limitations found in the Suits in Admiralty Act.

In short, the 1960 amendment to the Suits in Admiralty Act was meant to straighten out problems of venue and to establish once and for all the exclusive jurisdiction of the district courts in maritime cases, 41 U.S.C. Section 603. There was never any intention by Congress to deprive a seaman of a remedy to which he had been previously entitled, nor to create the risk of delay in voyages of ships in Government service arising from seizure of those ships by private parties.

C. THIS DECISION BELOW CONFLICTS WITH COSMOPOLITAN AS TO THE SUABILITY OF THE OPERATING AGENT SHIPOWNER

The decision below says nothing about whether or not VCI was an agent of the United States Government at the time of Alexander's injury. Instead, in 63 F.3d at 823 and fn. 1 and 2, it expressly rejects any application of the "operated for" language of 46 U.S.C. §741. In so doing, it directly contradicts *Cosmopolitan, supra*, for the reasons about to be discussed herein.

The 1950 Amendment to the Suits in Admiralty Act affirmed that only the United States is ultimately responsible for the acts of its maritime agents. This Amendment was in response to prior Supreme Court decisions which had suggested possible confusion as to whether a party plaintiff was permitted to sue the private owner who

operated a vessel for the United States or had the right to sue the United States within the statutory two-year limitation. *See, e.g., Caldarola v. Eckert,* 332 U.S. 155 (1947); *Cosmopolitan Shipping Co. v. McAllister,* 335 U.S. 870 (1949); *Lustgarten v. U.S. Shipping Emergency Fleet Corp.,* 280 U.S. 320 (1930).

The legislative history made it clear that the United States assumed liability for both actions or failures to act of its maritime agents, thus lending purpose to the term "operated by or for" distinction:

> "The Committee believes that litigants should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by the lack of clarity in the opinions of the Supreme Court. Legislative relief is requisite not only to save to litigants possessing meritorious claims their right to a day in court, but also to settle the question of remedy in future cases."

1950 U.S. Code, Cong. Serv., at page 4209.

The decision below rejects the applicability of the term "operating for" in the Suits in Admiralty Act. As such, a vessel carrying munitions and cargo exclusively for the Department of the Navy under a time charter may be seized. The decision fails to reconcile Sections 741 and 742. See 63 F.3d at 823 and fns. 1 and 2.

This Court has previously held that §741 must be read *in pari materia* in order to support a consistent scheme of legislation. *Blamberg Brothers v. United States,* 43 S.Ct. 179 (1923); *Eastern Transport Co. v. United States,* 47 S.Ct. 289 (1926).

Therefore, this Court is requested to answer the ultimate question: Does Congress legislatively require that the United States be responsible for the actions of its maritime agents when a vessel is time chartered by the United States?

The statutory answer is "yes." A simple reconciliation of the "operating by" and "operating for" language of the Suits in Admiralty Act can be made when 46 U.S.C §§741, 742 and 745 are read *in pari materia*:

> "In cases where a privately owned vessel is operated for the United States, a proceeding in admiralty can be maintained for such vessels against the United States by reason of the same subject matter against the agent or employee of the United States whose actions or omissions gave rise to the claims."

The 1950 Amendments to the Suits in Admiralty Act reiterated Congress's intent that the United States be ultimately responsible for the acts of its "maritime agents," such as VCI. In *Smith v. United States, supra,* the Court held:

> "The intent of the 1950 Amendment to the Suits in Admiralty Act, promulgating the proviso excluding the agent from suability, was not to keep alive the liability of a private person, firm or cooperation having charge of a government ship. It was just to the contrary. It was the adoption by Congress of the exclusivity principle enunciated in *Cosmopolitan Shipping Co. v. McAllister, supra,* 337 U.S. 783, 69 S.Ct. 317. Another purpose was to designate unequivocally the one to whom a claim for loss caused by the government ship should be directed . . . " (346 F.2d at 453)

The decision below contains a serious error of statutory interpretation that in effect edits out the term "operated for" found in 46 U.S.C. §741.

D. THE DECISION CONFLICTS WITH CALMAR BY EXEMPTING TIME CHARTERS FROM EXCLUSIVITY

The gravamen of the decision below is that when a vessel is time chartered by the United States Government, an injured seaman must prove either overall operational control by the Government or independent direct negligence on its behalf to recover under the Suits in Admiralty Act (63 F.3d at 822-823). This aspect of the decision is in particular contradiction to *Calmar, supra.*

The United States has indeed waived its sovereign immunity to permit the assertion of a claim arising from a vessel time chartered to the United States. In *Calmar S.S. Corp., supra,* Calmar Corporation had entered into a time charter with the United States to carry military supplies to the Philippines. Suit was filed against the United States to recover charter hire and for loss of the vessel. This Court held that a time-chartered vessel is employed as a "merchant vessel" and "operated for" the United States so that suit is cognizable under the Suits in Admiralty Act. See also, *Matson Navigation v. United States,* 284 U.S. 352 (1932); *Burkholder v. United States,* 60 F.Supp. 700 (E.D.Pa. 1945); *Epstein v. United States,* 86 F.Supp. 740 (S.D.N.Y. 1949); *Gulf Oil Corporation v. United States,* 121 F.Supp. 937 (S.D.N.Y. 1954); *Stubblefield v. Vickers Towing Company,* 674 F.Supp. 566 (N.D.Ms. 1987); *Dibiase v. United States,* 711 F.Supp. 648 (D.Maine 1989).

The Fifth Circuit in *Trautman v. Buck Steiber,* 693 F.2d 440 (5th Cir. 1982) also held that a time chartered vessel operated for the United States fell within the jurisdiction provided by §741.

> It would seem to the Court that an extensive operation or direction of the vessel by government personnel would be required to make the vessel operated "by the United States" in that something closer to a *time charter* where the government directs the vessel's overall function, even though the owner may control the operation of the vessel's personnel and equipment, rather than a single purpose contract entered into with an independent contractor, would be required to make the vessel "operated for the United States." (*Id.* at 444)

Once the "jurisdictional hook" was established, the *Trautman* court had to decide whether Buck Steiber was a "maritime agent" of the United States or whether an independent admiralty claim would lie against the United States but for its sovereign immunity in order to impose application of the Suits in Admiralty Act:

> "Whether Steiber was an *agent* of the United States *and/or* whether the United States was in sufficient operation or control of Steiber's activities in order to cause The United States to be liable under the Jones Act, 46 U.S.C. §688 for the negligence of Steiber which caused or contributed to appellant's injuries." (*Id.* at 445)

The primary inquiry was not whether an independent admiralty claim against the United States could be found but whether an agency relationship existed.

The Suits in Admiralty Act merely substitutes a remedy against the United States for a claim against the private operation. *See, Bradey, supra.*

The Suits in Admiralty Act authorizes suit against the United States and provides an exclusive remedy under the following three situations: (1) where an injury is caused by a vessel *owned* by the United States; (2) where an injury is caused by a vessel *operated by* the United States; (3) in cases where an injury is caused by a vessel *operated for* the United States. The language of the statute is disjunctive and therefore, the fulfillment of any one of the aforementioned conditions will satisfy the requirements of the Act.

The decision below joins the Fifth Circuit (by way of *Williams supra,*) in assuming that under *Trautman, supra,* the Suits in Admiralty Act could not provide a cause of action against the United States. It requires that an independent admiralty claim be shown to exist against the United States. However, 46 U.S.C. §742 plainly states that "where if such vessels were privately owned or operated . . . , a proceeding in admiralty *could* be maintained . . . against the United States." Section 742 does not state "if" a proceeding in admiralty could be maintained, an action against the United States could be brought. There is no statutory requirement that an independent claim against the U.S. be cognizable. Correctly or incorrectly, Congress has the power to provide an exclusive remedy against the United States in this case. *Smith, supra* 346 F.2d at 454.

CONCLUSION

The writ should be granted to resolve the conflict between circuits and to require the Ninth Circuit to conform to the settled teachings of this Court.

Respectfully submitted,

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Gerald E. ALEXANDER,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 93-17320.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 16, 1995.

Decided Aug. 7, 1995.

Vessel owner's employee brought personal injury action against United States as time charterer of vessel. The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., granted summary judgment for government, and employee appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) United States did not exercise operational control over vessel either under terms of time charter or by its conduct; (2) employee failed to establish how alleged independent negligence of government in supervising unloading of cargo was proximate cause of his injuries; and (3) employee could not prevail on his "financially responsible contractor" theory of liability.

Affirmed.

Thomas J. Boyle, Sullivan, Johnson & Boyle, San Francisco, CA, for plaintiff-appellant.

Jeanne M. Franken, U.S. Dept. of Justice, San Francisco, CA, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before: SCHROEDER, BEEZER and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

I. OVERVIEW

Gerald E. Alexander appeals the district court's summary judgment in favor of the United States in his personal injury action. Alexander was injured aboard the S.S. Santa Adela which was chartered to the United States by his private employer. The district court held the government was not responsible for Alexander's injuries because it was not in operational control of the ship and committed no acts or omissions of independent negligence. We have jurisdiction over Alexander's timely appeal, 28 U.S.C. § 1291, and we affirm.

II. FACTS

Alexander was chief mate aboard the S.S. Santa Adela. He was employed by the owner of the ship, Vessel Charters, Inc. (VCI), which is now bankrupt. The ship was chartered by VCI to the United States Navy. According to the express language of the charter, VCI hired and was responsible for the crew. The charter expressly proclaimed it was not a demise charter. A "demise" or "bareboat charter" grants total control of the vessel to the charterer for the charter period. *See Blacks Law Dictionary* 136 & 388 (5th Ed.1979). Under a "time charter," however,

the owner continues to operate the vessel and the crew remain employees of the owner. *Id.* at 1330.

At the time Alexander was injured, the ship was moored in South Korea. Government officials were supervising the unloading of the ship's cargo of explosives. While this was going on, the ship's first assistant engineer was attempting to fix a lifeboat winch. Alexander and the captain of the vessel were standing near the lifeboat, conferring on an unrelated matter, when the winch handle flew off and struck Alexander in the head. He suffered injuries and brought suit against the United States. After discovery, the district court granted the government's motion for summary judgment, and this appeal followed.

III. DISCUSSION

Pursuant to the waiver of sovereign immunity in the Suits in Admiralty Act (SIAA), 46 U.S.C. § 742, Alexander can maintain his personal injury action against the United States if his action could be maintained against a private party under traditional admiralty law. *See Sutton v. Earles,* 26 F.3d 903, 911-12 (9th Cir.1994); *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir.1989), *cert. denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990).

The charter document in this case creates a time charter. Under traditional admiralty principles an injured seaman cannot sue a time charterer unless the seaman can show either the time charterer had enough control of the vessel to render it the owner *pro hac vice, Williams,* 874 F.2d at 1062, or the time charterer was actively negligent. *See* Thomas J. Shoenbaum, *Admiralty and Maritime Law*

§ 10-12 at 404 (1987) ("In a non-demise charter, the charterer is normally not liable for injuries to crew members for unseaworthiness or operating negligence. Where, however, the charterer is actively negligent or undertakes operating functions on the vessel, he will be liable for injuries resulting from [his] own acts.") (hereafter "Shoenbaum").

1. Operational Control

The charter is unambiguous – VCI retained operational control of the Santa Adela under the charter. Alexander's citation to *Favorite v. Marine Personnel and Provisioning, Inc.*, 955 F.2d 382 (5th Cir.1992), is inapposite. In *Favorite*, the court found a charter that included the statement "Operational control will be exercised by the [charterer-government]" to be a bareboat charter. *Id.* at 387. There is no such language in the instant charter.

Alexander could still prevail if he could show that despite the language of the charter, the government actually exerted operational control over the vessel. In support of this theory, Alexander relies on his own conclusory declaration that the Santa Adela operated more like the ship in *Favorite* than the ship in *Williams*, and he was a crew member on both ships. This testimony, however, is irrelevant because the *Favorite* court grounded its finding of a bareboat charter in the language of the charter rather than the operation of the vessel. *Favorite*, 955 F.2d at 387.

Alexander also relies on the deposition testimony of David Sears. Mr. Sears testified that the government exercised operational control over the vessel to such an extent

that the charter was the equivalent of a demise or bareboat charter. The district court rejected this testimony on the ground that Mr. Sears was not a qualified expert. The court stated: "Mr. Sears's qualifications are not at all on point with the issues in this case, namely interpretations of charters and operational control of chartered vessels."

We have reviewed Mr. Sears's deposition and agree with the district court's assessment of his qualifications. The district court's exclusion of Mr. Sears's testimony was not "manifestly erroneous." *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental Inc.*, 944 F.2d 597, 601 (9th Cir.1991).

Alexander also relies on the fact that the government directed the movement and cargo operations of the Santa Adela. A time-charterer, however, always directs the movements and cargo operations of the ship. *See* Shoenbaum § 10-1 at 382 (time-charterer directs the movements); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1306 (9th Cir.1981) (time-charterer controls cargo operations), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982). The time-charterer's exercise of these rights is not inconsistent with the vessel owner's control of the vessel and its crew. Shoenbaum § 10-1 at 382.

Because the government did not exercise operational control over the Santa Adela, a negligence action will not lie against the United States under traditional admiralty principles. In reaching this conclusion, we agree with the Fifth Circuit's analysis in *Williams*, notwithstanding Judge Gee's vigorous dissent in that case.

In his dissent in *Williams*, Judge Gee argued that the term "such vessel" in 46 U.S.C. § 742[1] means those vessels referred to in 46 U.S.C.App. § 741.[2] Section 741 includes vessels "operated for" the United States; therefore, according to Judge Gee, a seaman may bring suit against the United States simply by showing that he was injured on a ship that was operated for the United States. *Williams*, 874 F.2d at 1064 (Gee, J., dissenting); *accord Nakano v. United States*, 1988 A.M.C. 2220, 2221 (S.D.Cal.1988) (decided under pre-*Williams* caselaw).

Although Judge Gee's view has some textual appeal, we reject it. His view requires the word "such" in section 742 to override traditional admiralty law, an illogical result which no authority supports and which we cannot

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[1] Section 742 provides in pertinent part:

> In cases where if *such vessel* were privately owned or operated . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation *mentioned in section 741 of this title.*

46 U.S.C. § 742 (emphasis added).

[2] Section 741 provides in pertinent part:

> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in possession of the United States or of such corporation *or operated by or for the United States* or such corporation . . . shall after March 9, 1920, *in view of the provision herein made for a libel in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions.

46 U.S.C.App. § 741 (emphasis added).

conceive of Congress intending absent more explicit language in the statute or some persuasive legislative history. There is neither.

2. Independent Government Negligence

Alexander contends that in any event, the government was negligent by its own independent act of negligently managing the unloading of the cargo from the Santa Adela. He asserts he had to be where he was when the winch handle hit him, because he had to be there to talk to the captain to deal with the government's unloading of the vessel. Moreover, he argues, another crewmember would have been available to help the first assistant engineer with the repair to the winch if all available crewmembers had not been engaged in unloading the cargo, for which the government was responsible.

Even if we were to assume that Alexander raised a triable issue of fact as to whether the government was negligent in managing the unloading of the vessel, he failed to demonstrate how that alleged negligence was the proximate cause of his head injury. *See generally Prosser and Keeton on Torts* at 272-280 (5th Ed.1984) (defining proximate cause). Alexander was injured because the winch handle came off while it was being repaired, an act which had nothing to do with unloading the vessel.

As an additional ground for the government's independent negligence, Alexander argues the government was negligent in "selecting a contractor without financial responsibility." Alexander cites only one case for the existence of this alleged tort, *Becker v. Interstate Properties*, 569 F.2d 1203, 1211 (3d Cir.1977), *cert. denied*, 436 U.S. 906,

98 S.Ct. 2237, 56 L.Ed.2d 404 (1978), and *Becker* was later abrogated. *Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237, 242-43 (3d Cir.1993).

Alexander cannot prevail on his "financially responsible contractor" theory because he cannot show the United States owed him a duty to hire a financially responsible contractor – even if he could show such a duty was breached.

IV. CONCLUSION

The government did not have operational control over the Santa Adela, nor did it commit any independent act of negligence which was the proximate cause of Alexander's injury. The district court did not err in granting summary judgment in favor of the government.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GERALD E. ALEXANDER, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	**No. C-91-0186 SBA** **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Nov. 10, 1993)

This is a personal injury action brought by plaintiff Gerald E. Alexander against defendant United States of America, for injuries suffered on board the vessel "SS Santa Adela." Presently before this court is defendant's motion for summary judgment. After having read the papers submitted and considered the arguments of the parties, this court concludes that defendant's motion should be granted.

I. BACKGROUND

Plaintiff was a crew member of the SS Santa Adela, a cargo vessel owned and operated by Vessel Charters, Inc. ("VCI"). On September 7, 1989, plaintiff sustained personal injuries while the vessel was moored at Chin Hae, South Korea. At the time of the accident, plaintiff was on deck near the First Assistant Engineer, who was attempting to repair the winch of the number one lifeboat. During the course of the repair, the First Assistant Engineer activated the power switch on the winch, after overriding the winch's interlock mechanisms. As a result, plaintiff

was struck in the head by a hand crank that flew off the winch.

Plaintiff is bringing this action under the Suits in Admiralty Act ("SAA"), 46 U.S.C. §§ 741-752. Under the SAA, the United States waives its sovereign immunity "[i]n cases where . . . if a private person were involved, a proceeding in admiralty could be maintained. . . . " 46 U.S.C. § 742. Thus, this court must decide the liability issue by determining whether a viable action could be brought against a private charterer in defendant's stead.

In admiralty, a demise or bareboat charterer obtains possession, control, and custody of the vessel. This amount of control justifies treating the demise charterer as a shipowner, liable for the activities occurring on the vessel, as well as for the seaworthiness of the vessel. Time charterers do not obtain sufficient control over the vessel so as to be placed "in the shoes" of the shipowner. Consequently, time charterers are not liable for the seaworthiness of the vessel. Instead, time charterers are liable only when injury results from activities that the time charterer has voluntarily undertaken, or when the time charterer is actively negligent.

Plaintiff alleges that defendant United States is liable for the accident because the United States had "operational control" of the entire vessel. At oral argument on October 19, 1993, plaintiff acknowledged that the charter at issue is not a demise charter and conceded that the four corners of the agreement created a time charter. Instead, plaintiff argued that the United States is liable because it had sufficient operational control over the entire vessel so as to make it functionally equivalent to a

demise charterer, and thus, liable for all injuries occurring on the vessel.

Alternatively, plaintiff argues that his injury resulted from the United States's active negligence. Plaintiff alleges that, at the time of the accident, the cargo operations directed by the United States expended the attention and energies of the deck personnel, thereby causing plaintiff's injury. Apparently, plaintiff's theory is that deck personnel would normally have repaired the lifeboat winch, and that their tending to cargo operations resulted in the First Assistant Engineer attempting to repair the winch without adequate supervision.

Plaintiff further alleges that the United States negligently caused the bankruptcy of VCI. Even after oral argument, the basis upon which plaintiff claims that this caused his injury remains unclear.

The United States has countered by moving for summary judgment. The United States claims that the charter by which it leased the Santa Adela from VCI was a time charter, and that any power exercised by the United States on the Santa Adela was within the well recognized province of a time charterer. Further, the United States alleges that plaintiff's injury did not occur as a result of any activity over which the United States had control.

II. DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is proper where it is established that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R.

Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* There is no issue for trial unless there is sufficient evidence favoring the nonmoving party in order that a jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In opposing a summary judgment motion, the nonmoving party must come forward with specific facts demonstrating a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-49. Nonetheless, any inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987).

B. Plaintiff Fails to Establish that Defendant Had Operational Control Over the Vessel

Plaintiff is not arguing that the United States, by the terms of the charter, held a demise or bareboat charter. Instead, plaintiff is arguing that, despite formally holding a time charter, defendant in fact had operational control over the entire vessel so as to render defendant liable for injuries occurring on that vessel. *See Guzman v. Pichirilo*, 369 U.S. 698, 699-700, 702 (1962).

1. Inapplicability of Charter Provisions

In light of plaintiff's argument, his attempt to point to provisions of the charter in support of his argument is irrelevant. Plaintiff, during oral argument, acknowledged that he is not arguing that, as a question of law to be determined by the four corners of the charter, defendant held a demise charter.[1] Thus, the provisions of the charter do nothing to support plaintiff's claim that, in functional terms, defendant had operational control over the entire vessel.

2. Inapplicability of Plaintiff's Past Experience

Plaintiff's declaration states he was an officer on both the Sealift Pacific in the case of *Favorite v. Marie Personnel & Proving, Inc.*, 955 F.2d 382 (5th Cir. 1991) (finding a bareboat charter), and the Green Lake in *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989) (finding a time charter). Plaintiff states in his declaration that he observed that the operation of the Santa Adela was similar to the operation of the Sealift Pacific, therefore supporting a finding that this action is dealing with a demise

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[1] This court notes that the provisions of the charter to which plaintiff points, H1.3(c)(i), H8.1, H8.2, H8.3, H15.1, H15.2, 28.1, 39.1, 39.2, E1.1, F3.1, G1.1, H14.2, H14.3, H4.2 and H24.1, are not sufficient to create a demise charter, especially in light of charger clause H17.1, which explicitly states that "[n]othing herein contained shall be construed as creating a demise of the Vessel to the Charterer, the Owner under this Charter retaining complaint and exclusive possession and control of the Vessel and her navigation."

or bareboat charterer. Conversely, plaintiff states in his declaration that his observations were that the operation of the Santa Adela differed from the operation of the Green Lake, therefore again supporting a finding that this case is dealing with a demise or bareboat charterer.

Plaintiff's conclusory statements in his declaration fail to meet the standard of specific facts as required by Federal Rule of Civil Procedure 56(e). Additionally, no effort has been made to establish plaintiff as an expert in charters or in admiralty law so as to enable him to offer legitimate opinion evidence on those issues. Moreover, plaintiff's claims are not adequate to support a finding that defendant had sufficient operational control so as to be held liable.

3. Extrinsic Evidence and Expert Testimony Fail to Establish the Existence of a Genuine Issue of Material Fact

Plaintiff's expert witness, Mr. David F. Sears, states in his deposition that defendant, not VCI, had much control over the vessel. This opinion was based on the reading of documents, apparently message traffic and correspondence, provided by plaintiff's attorney. Mr. Sears notes that defendant gave "specific directives to the master of the vessel instead of working through the owner as far as when to bunker, when to move the ship, where to put the ship." Deposition of David F. Sears at 41:21-24. Plaintiff's attorney asked Mr. Sears if he had reached an opinion as to who had operational control of the vessel. Mr. Sears responded that VCI "was to pay the crew, sign the paychecks and take care of those types of things, but the

actual day-to-day operation of the vessel was being closely controlled by the charterer." *Id.* at 45:2-5.

Mr. Sears's qualifications are not at all on point with the issues in this case, namely interpretations of charters and operational control of chartered vessels. Mr. Sears admits that he has only a "rudimentary" knowledge of charters, *id.* at 23:2, and also admits that he has no experience in commercial navigation, *id.* at 14:22-15:2, 15:23-16:2. Even taking into consideration that "[t]he inquiry envisioned by [Federal Rule of Evidence] 702 is, we emphasize, a flexible one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2797 (1993), this court holds that Mr. Sears cannot be admitted as an expert to testify to the existence of a demise charter or on the issue of operational control.

Independent of Mr. Sears, plaintiff points to extrinsic evidence in support of his contention that defendant had operational control of the vessel. While this evidence is admissible under Federal Rule of Evidence 703, it fails to establish that defendant had operational control.

First, much of this evidence merely shows that defendant had control over the movements of the chartered vessel. This power is well within those generally exercised by time charterers, and thus cannot be construed as establishing operational control. *See Barnett v. United States*, 1991 A.M.C. 418, 424 (N.D. Cal 1990).

Second, much of this evidence shows that defendant exercised considerable control over cargo activity. However, it is common for cargo activity to be controlled by time charterers. *E.g., Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1306 (9th Cir. 1981); Schoenbaum, *Admiralty and*

Maritime Law, § 10-12, at 403 (1987). Defendant's control over cargo activity in no way supports a claim that defendant had operational control over the entire vessel.

Third, plaintiff's injury resulted from an attempted repair of a lifeboat winch. This activity was in no way connected with cargo activity. Thus, defendant's control over cargo activity does not render it liable for plaintiff's injury.

This court finds that any additional extrinsic evidence produced by plaintiff is insufficient to establish a genuine issue of material fact concerning whether defendant had sufficient operational control over the entire vessel so as to make defendant liable for all activity occurring on the vessel. Consequently, defendant is entitled to summary judgment on plaintiff's claim that defendant had operational control of the vessel.

C. No Active Negligence on the Part of Defendant

According to plaintiff, defendant's active negligence caused the accident and renders it liable for plaintiff's injury. Plaintiff asserts that defendant's cargo operations so exhausted the attention and energies of the deck personnel that the First Assistant Engineer had to repair the lifeboat winch. However, the activity resulting in plaintiff's injury can be attributed to defendant's use of deck personnel to help with cargo operations only with extreme difficulty. This is especially so because plaintiff concedes that no government personnel were engaged in the repair of the lifeboat winch.

To be liable for negligence, plaintiff must show that defendant's conduct was the proximate cause of plaintiff's injury. M.J. Norris, *The Law of Maritime Personal Injuries 4th*, § 9:7, at 455-56 (1990) (citing *Field v. A/S Granger Rolf*, 300 F.2d 428 (9th Cir. 1962)). Plaintiff has been unable to provide a theory satisfying the causation element of his claim.

Perhaps recognizing this, plaintiff at oral argument tried to use the operational control claim to satisfy this causal element of the negligence claim. However, as plaintiff himself correctly acknowledged at oral argument, a claim of active negligence is made independent of any claim of operational control. Thus, plaintiff's efforts to use his operational control claim in support of his active negligence claim are unavailing.

Apart from that operational control claim, defendant cannot be held to have undertaken the activity that resulted in plaintiff's injury. An employee of VCI, not of defendant, attempted to repair the winch. Consequently, causation cannot be satisfied, and as a result summary judgment for defendant is appropriate. Plaintiff has failed to point to any issue of fact that would allow defendant to be held liable, on the basis of negligence, for plaintiff's injury.

D. Defendant Not Liable on the Basis of VCI's Bankruptcy

Lastly, plaintiff asserts that defendant should be held liable for plaintiff's injury because defendant negligently caused the bankruptcy of VCI.

Even if defendant somehow negligently caused VCI's bankruptcy, this did not cause plaintiff's accident. The government cannot be held responsible for plaintiff's injury on the basis that it contributed to plaintiff having a more difficult road to forge in collecting a liability judgment. Moreover, ignoring the irrelevance of this claim, defendant has in no way obstructed plaintiff from maintaining an action against VCI, the apparently proper defendant to these claims, in bankruptcy court.

Thus, summary judgment in favor of defendant is appropriate on this claim as well.

III. Conclusion

Plaintiff having failed to establish the existence of any material fact in support of his operational control, active negligence, or liability-for-bankruptcy claims, plaintiff now faces a dual obstacle in this action. Defendant is entitled to summary judgment on these claims as a matter of law. Additionally, plaintiff has failed to demonstrate that a private party in defendant's position could be held liable, and thus in this action the United States cannot be said to have waived sovereign immunity under the SAA.

ACCORDINGLY IT IS ORDERED THAT:

1. Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Date: November 2, 1993

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GERALD E. ALEXANDER, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	**No. C-91-0186 SBA** **JUDGMENT** (Filed Nov. 10, 1993)

In accordance with this court's Order granting defendant's motion for summary judgment in this action,

IT IS HEREBY ORDERED that FINAL JUDGMENT is entered in favor of defendant.

IT IS SO ORDERED.

Date: November 2, 1993

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALD E. ALEXANDER, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 93-17320 D.C. No. CV-91-00186-SBA ORDER (Filed Sep. 27, 1995)

Before: SCHROEDER, BEEZER and THOMPSON, Circuit Judges.

The petition for rehearing is denied.

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93-17320

(2)

Supreme Court, U.S.
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No. 95-1266

In the Supreme Court of the United States

OCTOBER TERM, 1995

GERALD E. ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, an injured seaman, could not maintain a personal injury action against the United States under the Suits in Admiralty Act, where petitioner's injury was caused by the independent contractor from whom the United States time-chartered the vessel.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Amell v. *United States*, 384 U.S. 158 (1966)	6, 7
Calmar S.S. Corp. v. *United States*, 345 U.S. 446 (1953)	6
Cosmopolitan Shipping Co. v. *McAllister*, 337 U.S. 783 (1949)	5
Forrester v. *Ocean Marine Indem. Co.*, 11 F.3d 1213 (5th Cir. 1993)	2
Matute v. *Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir.), cert. denied, 502 U.S. 919 (1991)	2
Petition of the United States, 367 F.2d 505 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967)	4, 5, 6
Reed v. *The Yaka*, 373 U.S. 410 (1963)	2
Smith v. *United States*, 346 F.2d 449 (4th Cir.), cert. denied, 382 U.S. 878 (1965)	5, 6
Trautman v. *Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982)	6
Walker v. *Braus*, 995 F.2d 77 (5th Cir. 1993)	2
Williams v. *Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990)	7

Statutes:

Suits in Admiralty Act of 1920, 46 U.S.C. 741 *et seq.*	2
46 U.S.C. 742	7
46 U.S.C. 745	4

Miscellaneous:

Restatement (Second) of Agency (1958)	5

In the Supreme Court of the United States

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GERALD E. ALEXANDER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 63 F.3d 820. The opinion of the district court (Pet. App. 9-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1995. A petition for rehearing was denied on September 27, 1995. Pet. App. 21. The petition for a writ of certiorari was filed on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was chief mate aboard the S.S. Santa Adela. The owner of the ship, and petitioner's em-

ployer, was Vessel Charters, Inc. (VCI). During the period at issue in this case, the Santa Adela was time-chartered to the United States. Under the provisions of the charter, VCI hired and was responsible for the crew. The charter expressly stated that it was not a "demise" charter.[1] Pet. App. 2-3.

Petitioner was injured in an accident that occurred while the Santa Adela was moored at Chin Hae, South Korea. While United States officials were supervising the unloading of the ship's cargo, the ship's first assistant engineer was attempting to repair a lifeboat winch. Petitioner and the ship's captain were standing near the lifeboat, conferring on an unrelated matter, when the winch handle flew off and struck petitioner in the head, injuring him. Pet. App. 3.

2. Petitioner brought this suit against the United States under the Suits in Admiralty Act (SAA), 46 U.S.C. 741 *et seq.* Following discovery, the district court granted the government's motion for summary judgment. The court rejected petitioner's contention that, although the charter between VCI and the United States was a time charter, the United States had in fact exercised operational control over the vessel so as to render the government liable for

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[1] Under a "demise" or "bareboat" charter, the vessel owner transfers full possession and control of the vessel to the charterer, who in turn supplies the crew and maintains the vessel. See, *e.g.*, *Reed* v. *The Yaka*, 373 U.S. 410, 412 (1963); *Forrester* v. *Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993). Under a time charter, the vessel owner retains primary possession and control over the vessel's operation and provides its own crew and maintenance. See, *e.g.*, *Walker* v. *Braus*, 995 F.2d 77, 80 (5th Cir. 1993); *Forrester*, 11 F.3d at 1215; *Matute* v. *Lloyd Bermuda Lines*, 931 F.2d 231, 235 (3d Cir.), cert. denied, 502 U.S. 919 (1991).

petitioner's injury. The court held that the terms of the charter did not support petitioner's operational control theory (Pet. App. 13), and it rejected petitioner's affidavit evidence as "conclusory" and "not at all on point with the issues in th[e] case." *Id.* at 14, 15. The court further held that evidence that the United States exercised control over the movements and cargo activity of the chartered vessel was consistent with the existence of a time charter and did not create a genuine issue of material fact as to liability, where petitioner's injury was unrelated to cargo activity. *Id.* at 15-16.

The court also rejected petitioner's contention that active negligence by the United States caused petitioner's injury. Observing that the winch repairs that resulted in petitioner's injury were performed by a VCI employee, the court found that petitioner had failed to satisfy the requirement of proximate causation. Pet. App. 16-17.

Finally, the court rejected petitioner's claim that the United States should be held liable because it caused VCI's bankruptcy or negligently selected VCI as a contractor. The court held that, even assuming that the United States had negligently caused VCI's bankruptcy, the government in no way caused petitioner's injury. Pet. App. 17-18.

3. The court of appeals affirmed. The court observed that, under the SAA, petitioner could maintain his personal injury action against the United States if his action could be maintained against a private party under traditional admiralty principles. Pet. App. 3. Under those principles, the court agreed with the district court that the contract between VCI and the United States was a time charter and that the government neither exercised operational control

over the vessel nor was actively negligent with respect to petitioner's injury.

The court held that neither the terms of the charter nor the extrinsic evidence presented by petitioner supported petitioner's theory that the government exercised operational control over the vessel. Pet. App. 4-5. It further concluded that the government's conduct regarding the unloading of the vessel, even if negligent, could not have caused petitioner's injury. *Id.* at 7. Finally, the court held that the government had no legal duty to select a contractor that would not later become insolvent. *Ibid.*

ARGUMENT

1. Petitioner's principal contention is that VCI was "a maritime agent of the United States for purposes of the [SAA], causing the United States to be exclusively liable for [petitioner's] injuries." Pet. 6. Section 745 of the SAA provides that "where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States * * * whose act or omission gave rise to the claim." Accordingly, where a vessel owner or operator is an agent of the United States, Section 745's "exclusivity provision" grants immunity to the agent and allows suits only against the United States. See, *e.g.*, *Petition of the United States*, 367 F.2d 505, 509 (3rd Cir. 1966), cert. denied, 386 U.S. 932 (1967). In this case, there was no evidence that an agency relationship existed between VCI and the United States.

Contractors hired by the United States to perform shipping tasks do not automatically become the government's agents. Rather, an agency relationship

arises only where the contractor is "employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control." *Petition of the United States*, 367 F.2d at 509; see also Restatement (Second) of Agency § 1(1) (1958). In his petition, and before the court of appeals (Pet. 7; Pet. C.A. Br. 30-31), petitioner has predicated his agency theory solely on the statement in clause H30.1 of the charter that "the Vessel is a representative of the U.S. Government and therefore it is important that the operation meets the highest possible standards of appearance and ship smartness." Pet. C.A. App. Vol. 1, Ex. A, Section H30.1. That clause, entitled "Standards of Appearance," relates only to VCI's duty to maintain the physical appearance of the Santa Adela. See *ibid.* ("To this end, the Owner and operator [VCI] will institute a continuous program of Vessel maintenance."). The clause clearly does not create a fiduciary or agency relationship between VCI and the United States.

Contrary to petitioner's contention (Pet. 6-7), the decision below does not conflict with *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949), *Smith* v. *United States*, 346 F.2d 449 (4th Cir.), cert. denied, 382 U.S. 878 (1965), or *Petition of the United States*, *supra*. In each of those cases, the United States owned the vessel at issue, and the language of the agreement between the government and the contractor vested control of the vessel in the United States. See *Cosmopolitan Shipping Co.*, 337 U.S. at 795 ("examination of the terms of the contract and the actual conduct of the parties under this agreement * * * demonstrates that the United States had retained * * * the possession, management, and navigation of the vessel and control of the ship's

officers and crew"); *Smith*, 346 F.2d at 451 ("the relevant portions of the agreement clearly demonstrate that the United States remained in control of the vessel at all times"); *Petition of the United States*, 367 F.2d at 509-510 ("Certainly, under the contract in this case [the contractor] owed the United States obedience and loyalty and was in significant ways subject to the government's direction and control. * * * We think the general sense and specific details of this agreement disclose a relation of principal and agent within the accepted legal conception of an agency relationship.").

Here, the vessel was owned and operated by VCI, and the court of appeals expressly held that "VCI retained operational control of the Santa Adela under the charter." Pet. App. 4; see also *id.* at 12-16. Having so held, the court did not err in declining expressly to address the question of agency. Cf. *Trautman* v. *Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (operational control by principal is essential element of agency relationship).

2. *Calmar S.S. Corp.* v. *United States*, 345 U.S. 446 (1953), cited by petitioner (Pet. 5, 13), is also inapposite. *Calmar* involved a suit by a shipowner against the United States for the claimed breach of a charter. There was no question that the United States was the proper defendant. The only issue addressed by the Court was whether the suit could be maintained under the SAA, or whether the shipowner was required to proceed under the Public Vessels Act or the Tucker Act. See *Calmar*, 345 U.S. at 446-448, 454-455.[2]

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[2] Contrary to petitioner's contention (Pet. 7-10), this Court's decision in *Amell* v. *United States*, 384 U.S. 158 (1966), is also

3. Petitioner contends, in essence, that the SAA imposes substantive, strict liability on the United States for any injury suffered by a seaman on a time-chartered ship. *E.g.*, Pet. 11. The rule that petitioner proposes would violate traditional admiralty law principles and contravene the SAA's purpose of limiting the United States' liability to cases in which an admiralty proceeding could be maintained against private parties *in personam*. See 46 U.S.C. 742; *Williams* v. *Central Gulf Lines*, 874 F.2d 1058, 1062-1063 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990). As the court below observed (Pet. App. 6-7), so construing the SAA would be "an illogical result which no authority supports and which we cannot conceive of Congress intending absent more explicit language in the statute or some persuasive legislative history."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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inapplicable. The Court in *Amell* held only that the 1960 amendments to the SAA did not preclude federal employees working on government vessels from enforcing certain rights under the Tucker Act.

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No. 95-1266

In The

Supreme Court of the United States

October Term, 1995

GERALD E. ALEXANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is operational control by the Government essential to the creation of an agency relationship under 46 U.S.C. § 745?

THE NEW POINTS RAISED BY THE OPPOSITION

Respondent argues that the Court of Appeals finding that V.C.I. retained operational control of the SANTA ADELA under the charter made it unnecessary to ". . . . address the question of agency". Petitioner deems this a "new point" within the meaning of Supreme Court, Rule 15.6.

Respondent also asserts that the petitioner claims that the Suits in Admiralty act imposes "strict liability" on the United States. This, too, is a "new point" to which petitioner will also reply herein.

ARGUMENT

1. *Petition of the United States*, 367 F.2d, 505, 509 (3d Cir. 1966) (Opp. 4, 5, 6) contains the following language relevant to this Reply:

> As a matter of legal definition, "agent" of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The accepted distinction between "servant" and "independent contractor" may place Mathiasen in the latter category, *since it is arguable that Mathiasen's day to day working of the ship was not subject to government control.* See Restatement, Agency 2d. § 2. But an independent contractor, no less than a servant may be an agent in that he is *employed as a fiduciary, acting for a principal and with a principal's consent and subject to the principal's overall control* and

> direction in accomplishing some matter undertaken on the principal's behalf. Restatement, Agency 2d, § 14 N (Id. emphasis added).

The above shows that respondent's quotation from *Petition of the United States, supra* (Opp. 5) is out of context.

The second phrase underlined is the portion quoted by respondent. When read with the entire paragraph, especially the first phrase underlined, it does not require anything approaching operational control as a prerequisite to an agency relationship.

Moreover, it shows that the operative section of the Restatement relied upon was § 14N, rather than § 1 (1).

Under § 14N, an entity may be both an independent contractor and an agent at the same time, depending on the nature of the transaction and the surrounding circumstances. See, e.g. *AT&T v. Winback and Conserve Program Inc.*, 42 F.3d 1421, 1436-1439 (3d Cir. 1004); *National Petrochemical Co. v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d. Cir. 1991).

The decision below, as well as *Williams v. Central Gulf Lines*, 874 F.2d 1058, 1062-1063 (5th Cir. 1989) cert. denied 493 U.S. 1045 (1990) (Opp. 7) and *Trautman v. Buck Steber Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (Opp. 6) which *Williams* follows, holds that " . . . operational control by the government is (an) essential element of (an) agency relationship." (Opp. 6)[1]

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[1] Contrary to what respondent contends (Opp. 5) petitioner's agency theory is not predicated solely on clause

Operational control is at least control over " . . . the day to day working of (a) ship". Finding such control to be essential to an agency relationship conflicts with *Petition of United States, supra,* to the legislative intent of the statute, and with the settled teachings of this Court.

2. For example, it specifically conflicts with *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949) (Opp. 5) which made " . . . the liability of the United States . . . exclusive . . . when governmental maritime activity is conducted through private contractors" and which Congress intended to codify in enacting 46 U.S.C. § 745. (Quotation from *Petition of United States, supra,* 367 F.2d at 510, last full paragraph).

It also specifically conflicts with *Calmar S.S. Corp. v. United States,* 345 U.S. 446 (1946) (Opp. 6) which makes it clear that Congress did not intend to treat shipowners who time charter their vessels to the Government any differently from those who demise them. Moreover, the Maritime Lien Act 46 U.S. § 30101 (3) restates this Congressional intent by defining a public vessel as " . . . any vessel owned, demise chartered or operated by the United States Government".[2]

H.30.1 of the charter. It is also based on the fact that the ultimate control of the S/S SANTA ADELA resided with M.S.C. in every respect regarding decisions involving navigation care, custody and sailing routes (Pet. 3) and clauses H1.3(c)(I), H8.3, H.15.1, H15.2, 28.1, 39.1, 39.2, E1.1, F3.1, G1.1, H14.2, H14.3, H4.2 and H24.1 (Pet. App. 13 at fn. 1).

[2] *Hopeman Bros Inc. v. USNS CONCORD,* 898 F. Supp. 338 (E.D. Va. 1995) has invoked this language to prevent seizure of a ship operated by the Government.

3. The United States continues to argue, as it did below, that the 1960 Amendments to the Suits in Admiralty Act cut down the existing rights of seamen on ships in Government service. This Court long ago ruled otherwise. *Amell v. United States*, 384 U.S. 158 (1966).

Moreover, the position of respondent is completely untenable, since the Congress made the Government vicariously liable for every act or omission of its agents "exclusive of any other action by reason of the same subject matter" (46 U.S.C. § 745) – i.e. even in circumstances where, if the agent's principal had been a private person he would not have been liable. See, e.g. *AT&T, supra*, 42 F.3d 1421, 1436-1437 and fn. 17, to the effect that a principal is not generally liable for physical torts committed by its independent contractor agent. (Citing Restatement (Second) Agency § 258). Cf. *Manuel v. United States*, 50 F.3d 1253 (4th Cir. 1995)

This was not altruistic legislation. Congress acted to avoid seizure of vessels – all vessels – in Government service lest the public business be delayed or inconvenienced by efforts to foreclose maritime liens.

4. Contrary to respondent's assertion, petitioner does *not* argue that the Suits in Admiralty Act imposes "strict liability" on the United States for seaman's injuries on ships in Government service. (Opp. 7) Only that, if the Owner of a vessel in Government service would be liable for such injuries, then the United States in the Suits in Admiralty Act voluntarily assumed such liability, relying upon its ability to obtain indemnity from the Owner under the charter, as well as (more significantly), the

insurance coverage against such liability which the owner was required to obtain for itself and the United States.

CONCLUSION IN REPLY

The Petition for a writ of certiorari should be granted, for the additional reasons of clarifying whether operational control by the government is an essential element of an agency relationship under 46 U.S.C. § 745 and of restoring parity between 46 U.S.C. § 745 and 46 U.S.C. § 30101.

Respectfully submitted,

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